

Child Welfare Mediation

Best Practices

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Child Welfare Mediation Staff

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Program Purpose

The purpose of the Child Welfare Mediation Program (“Program”) is to further the Juvenile Court’s mission to serve the best interests of the child, while supporting parents’ rights, responsibilities, and participation. The Program also serves to build cooperation among child welfare constituents and streamline the child welfare process in the courts.

Definition of Child Welfare Mediation

Child Welfare Mediation involves the use of a skilled, neutral, third party to assist families, agencies, and attorneys in reaching a mutually acceptable resolution of the issues regarding child welfare and placement. The mediator has no authoritative decision-making power and does not make recommendations as to the outcome of the case. In mediation, participants attempt to resolve the issues cooperatively before the case goes to trial. Mediation puts the decision-making power in the hands of the parties involved.

Benefits of a Court-Based Child Welfare Mediation Program

- Facilitates early, appropriate settlements that serve and protect the best interests of the child.
- Preserves the dignity and involvement of family members, resulting in less alienation from the court process.
- Facilitates a full exchange of the most current case information, clarifying the roles and responsibilities of each of the participants.
- Provides parents with information on the court process, the workings of the system, participant interests/positions and available services.
- Provides all parties with information on the child’s needs and development, family dynamics, participant interests/positions and available services.
- Reduces adversarial confrontations and creates a common goal for participants.
- Encourages the accountability of family members and professionals interacting with the family.
- Helps develop a plan to keep the family together.

Referrals to Mediation

The Court is the “gatekeeper” for referrals to mediation. Any party, attorney, caseworker, professional, or individual involved in the case can, at any time in the history of the case, request the Court to refer the matter to mediation. The Court retains the authority to grant or deny the request, or may itself initiate the referral to mediation.

Attendance:

Once the matter is ordered to mediation by the Court, attendance at the mediation is mandatory for the parents, attorneys, and assigned caseworkers. Failure to attend mediation may result in court ordered sanctions. Additional involved or interested family members, individuals or professionals whose participation in mediation may be helpful, may be invited to attend mediation. Children who are the subject of the petition are not usually present during the mediation, but may participate with prior approval of the guardian ad litem.

It is expected that parties and their counsel appear in person for mediation. Mediation is a process that requires interactive, face to face dialogue. Under exceptional circumstances where telephonic participation is necessary, the requesting party must contact the mediation office at 801-238-7846 at least one week prior to the mediation date, to determine if telephonic participation is possible.

Observers:

Mediation is a closed and confidential process, therefore, it is not appropriate to have observers in mediation. Participating agencies, e.g., Assistant Attorneys General, Guardians ad Litem, and the Division of Child and Family Services, who wish to have interns observe for educational purposes must get prior clearance through the mediation office. Participation of observers is not guaranteed and will ultimately be up to the parties and the mediator. No more than one observer will be allowed per mediation session.

Guidelines for Referring Cases to Mediation

Fact patterns are the easiest way to identify whether a case might lend itself to mediation. Legal stage, type, history, or severity of case are not predictive of whether mediation will be useful. Mediation may be useful when the following fact patterns are present:

- Whenever the parties indicate that the alternative to mediation would be a contested hearing;
- Cases in which it is important to enhance, improve, or re-establish relations between any involved parties in order to move the case forward;
- Discussions are at an impasse;
- Any case where the parents would benefit from getting an early start on the service plan;
- Visitation problems;
- Relatives asking for placement of the children;
- Permanency for the child is on hold because of a conflict between any parties involved;
- A need to try something different because prior arrangements regarding the children have not be successful;
- Significant court room conflict which tends to hamper the progress of the review hearings.

SCHEDULING:

Assignment of Mediator

Mediators are assigned to cases on a rotating basis. In order to maintain the integrity and neutrality of the Mediation Program, parties may not choose a particular mediator.

Once the Court orders a case to mediation, the court clerk will access the mediation calendar and set the mediation date and time in court on the record, with all parties present. Only cases where there is an order from the Court may be calendared. The clerk then sends an email to the Child Welfare Mediation Caseload Coordinator, who then assigns a mediator to the case.

Requests for Date Changes

After the parties agree to a date and the mediation has been calendared, there are several options for responding to a request for a date change:

- Refer the person making the request directly to the Mediation Program (801-238-7846)
- The clerk can access the mediation calendar and provide potential dates to the requester. The original mediation date stands until all parties agree on a new date. The new mediation date must come prior to the next scheduled court date, keeping in mind statutory guidelines. Once the requester contacts the parties, clears a new date, and a new appointment is e-mailed to the mediation calendar, the Mediation Program will mail out written Notice to all the parties present in the original hearing.

Cancellation

Canceling a mediation requires the approval of the Court or approval of the Mediation Program. Clerks should not agree to cancel a mediation but should either instruct the person making the request to file a Motion/Order to vacate the Mediation Order directly with the Court, or in cases of extenuating circumstances, refer them to the Mediation Program.

The Mediation Process

Whenever possible, child welfare mediation will be conducted in the shared language of the participants. When the participants speak different languages, interpreters, court-certified when possible, will be assigned to translate during the mediation session. The Mediation Program is not responsible for arranging for interpreters. Responsibility is determined on a District basis. Individual District interpreter policy information may be obtained from the court clerk. Family members or individuals directly associated with the case may not act as the interpreter during the mediation session.

It is the responsibility of the mediator to suspend or terminate the mediation process if it is determined that the mediation cannot be conducted in a safe or appropriately balanced manner, or if any party is unable to participate in an informed manner for any reason, e.g., under the

influence of drugs or alcohol, unable to understand the proceedings or process, fear, safety, etc.

- The Agreement to Mediate (copy attached) will be presented to all parties participating in the mediation. Any party not signing this agreement will be excused from the mediation.
- Initially, participants in the mediation will be only those who are parties to the petition. Other interested parties will only participate as determined by the mediator, i.e., certain parties may be excused while the petition is being mediated but may be invited back into the mediation when dispositional issues are being discussed.
- If parties have retained counsel, both the attorney and the individual are required to be present in order for the mediation to proceed.
- If counsel has been retained, but is unable to be present, a Limited Waiver to Allow Client Communication During Mediation (copy attached) must be provided to the mediator prior to commencement of the mediation in order for that individual to participate in the mediation.
- If counsel has not been retained, a party may proceed pro se. The attorneys present at the mediation are not able to provide legal advice to the unrepresented party.
- Incarcerated parents are eligible to participate in mediation. Transportation orders are not the responsibility of the Mediation Program. Responsibility is determined on a District basis. Individual District prisoner transportation policy information may be obtained from the court clerk. Prison policies differ from local jail policies and each law enforcement agency is responsible for determining security procedures during the mediation session.
- The Mediation Program accepts cases for mediation where there are concurrent criminal charges. The parameters for discussion and resolution will be at the discretion of counsel for the parties.
- The Mediation Program accepts cases for mediation where there are allegations of domestic violence. Mediators receive on-going and specialized training in domestic violence issues. (See Domestic Violence Protocol on page 7 of this document.)
- The mediator may elect not to convene the mediation if all parties are not present within 20 minutes of the scheduled start time.

The mediator will make concerted reasonable efforts to insure that any agreement reached in mediation is clearly understood by each participant. The mediator will write down any resolution or agreement as a Memorandum of Understanding which shall be reviewed, approved, and initialed by all parties and attorneys participating in said agreement. If the parties do not reach agreement during the mediation session, the Memorandum of Understanding will reflect this

outcome. Copies of the handwritten Memorandum of Understanding will be provided to all participants. Upon conclusion of the mediation session, the mediator will prepare a disposition notice for the Court, reporting attendance of parties and documenting any agreements or resolution. Any remaining areas of disagreement requiring court action are referred back to the Court. If the mediation is unable to convene, due to non appearance of critical parties, the mediator will prepare a disposition notice reporting attendance and referring the case back to the Court for further disposition.

Confidentiality

Child Welfare Mediation is a confidential process (see Utah Code 78-31b-8). Participants in mediation agree to keep confidential the communications made during the mediation process. All written and oral communications made during the mediation process are privileged, that is, they are confidential and their disclosure by anyone is prohibited. There are, however, three exceptions to this privilege of confidentiality.

- First, communications otherwise privileged may be disclosed with the consent of all the participants. Participants include the parties, their attorneys and the mediator. The participants may discuss matters among themselves regarding the case, but disclosure outside the circle of participants signing the Agreement to Mediate requires the consent of all.
- Second, there may be certain matters, such as elder abuse, abuse of incapacitated persons, or new allegations of incidents of child abuse, or threats of imminent physical harm to which the privilege does not extend. If a DCFS caseworker is present at the time the allegation is made, it is deemed reported and the Child Welfare Mediation Program will take no further action.
- Third, the Agreement to Mediate which must be signed by the participants, and any written agreement made and signed by the participants as a result of mediation may be used in any relevant court proceeding. That future agreement may be made part of the court record by the judge presiding over this case. Also, any matter that is otherwise admissible in a court of law does not become inadmissible solely because it was a matter communicated during a mediation session.
- This privilege of confidentiality may be asserted by any of the participants, including the mediator. The participants agree that they will not at any time during or after the mediation call the mediator as a witness in any legal or administrative proceeding concerning this dispute. To the extent that they may have a right to call the mediator as a witness, the participants waive any such right by signing the Agreement to Mediate.
- The participants further agree not to subpoena or demand the production of any records, notes, documents, work products or the like of the mediator in the Mediation Program, in any legal or administrative proceeding concerning the dispute. To the extent that they may have a

right to such records, notes, documents or work products, the participants waive any such right by signing the Agreement to Mediate.

Domestic Violence Protocol

The child welfare mediator assigned to a case will review any petitions or other documents sent to the mediation program, prior to commencing the mediation. If there are allegations of domestic violence against one or both of the parties, the mediator, in consultation with the DCFS caseworker and defense counsel, will assess the ability of the victim parent to fully and safely participate and reach a non-coerced resolution. The mediation may go forward if protective orders or no contact orders are in place, as in other court proceedings, such as hearings, pre-trials, and trials.

This protocol holds that the issue of the violence itself will never be mediated, (i.e. justifying child or partner abuse), though responsibility and a structure for ending the violence and ensuring a safe environment in the future may be appropriate for discussion.

The mediator has the option of having separate mediation sessions with the parties, separating the perpetrator of the violence and the victim. Conversely, the mediator may elect to conduct the mediation session jointly if s/he feels it is safe and appropriate.

It is ideal that in child welfare cases where domestic violence is an issue, separate counsel be appointed for each parent/party. If this has not been done, the mediator may, after consulting with the assistant attorney general, the guardian ad litem, and defense counsel decide not to convene the mediation and refer the case back to the court for appointment of conflict counsel.

Juvenile court security personnel may be requested to stand by at the site of mediation or to escort clients to their vehicles upon completion of the session. Additionally, when, during the course of mediation, it appears that there is a clear and immediate danger to an individual or to society, the mediator may breach mediation confidentiality and take appropriate action aimed at protecting those in jeopardy.

Program Evaluation

To measure program effectiveness and impact on participants, the program includes an evaluation component that gathers both qualitative and quantitative data. Data may be gathered from the following sources:

- Mediator completes forms following each session (copy attached).
- Parents complete an exit survey, available in Spanish and English (copy attached).
- Assistant Attorneys General, Guardians ad Litem, DCFS caseworkers, and Judges are surveyed annually.

Administrative Oversight

The Alternative Dispute Resolution (ADR) Department of the Administrative Office of the Courts provides case load coordination, case consultation, and supervision to mediators. The ADR Department also serves as liaison between the Child Welfare Mediation Program and other agencies and ensures that program evaluation information is reviewed and utilized in other areas of the court system.

The incidental, extra costs such as added security, long distant telephone charges, transportation, etc., are the responsibility of the referring district. If the district chooses to have parties involved pay for these costs, it is the district's responsibility to make those arrangements.